85-524

No.

FILED
SEP 26 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

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ROBERT TUDOR,

Petitioner,

v.

JEFFREY LEE GLAESMAN and
ESTHER MARIE GLAESMAN,

Respondents.

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Petition for Writ of Certiorari to the
Supreme Court of the
State of Kansas

---

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Washington, D.C. 20036
(202) 785-4166

## Question Presented for Review.

Whether the adoption of an Indian child pursuant to Kansas law without the consent of its Indian father and without a showing that the father is unfit, violates the protective provisions of the Indian Child Welfare Act, 25 U.S.C. §§1901-1963, or the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution.

## Parties

Respondents were the only parties aside from petitioner in the proceedings below. However 28 U.S.C. §2403(b) may be applicable and in accordance with Supreme Court Rule 28.4(c), the Attorney General of the State of Kansas is being served with this Petition.

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IN THE

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ROBERT TUDOR,

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v.

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ESTHER MARIE GLAESMAN,

Respondents.

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**Petition for Writ of Certiorari to the Supreme Court of the State of Kansas**

---

## Opinion Below.

The unreported opinion of the District Court of Butler County, Kansas is set out in the Appendix. The summary affirmance of the Kansas Court of Appeals

and the subsequent denial of the petition for review of the Kansas Supreme Court are also set out in the Appendix.

## Jurisdiction.

The petition for review was denied by the Supreme Court of the State of Kansas on June 28, 1985. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

## Constitutional Provisions and Statutes Involved.

United States Constitution, Amendment XIV, §1

> ...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code, Title 25

§1912. Pending court proceedings

(f) Parental rights termination orders; evidence; determination of damage to child

No termination of parental rights may be ordered in such proceeding [involuntary proceeding in State court] in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

* * *

§1913. Parental rights, voluntary termination

* * *

(c) Voluntary termination of parental rights or adoptive placement; withdrawal of consent; return of custody

In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

* * *

Kansas Statutes Annotated,

§59-2102. Written consent required

. . .

(a) Before any minor child is adopted, consent must be given to such adoption by:

(1) The living parents of a legitimate child;

(2) the mother of an illegitimate child;

(3) the father of an illegitimate child, if the father's consent is required by the court pursuant to K.S.A. 59-2105;

* * *

§59-2105. Adoption of illegitimate child without father's consent

(a) When a petition for adoption of an illegitimate child is filed and the consent of the father of the child is not given, the court shall determine, in the adoption proceeding, whether the father's consent is required.

(b) If the court is satisfied that all reasonable efforts at giving notice of the hearing to the putative father have been attempted, the court shall proceed with the hearing

on whether the father's consent to the adoption is required.

(c) At the hearing, the court shall first resolve any dispute regarding paternity. At the conclusion of the hearing, the court may determine that the father's consent to the adoption is not required only if the court finds the existence of any of the following factors:

* * *

> (4) The father failed without reasonable cause to provide support for the mother during the six months prior to the child's birth

* * *

## Statement of the Case.

This case began when respondents petitioned for the adoption of Leanne Marie Wedel, the illegitimate daughter of Laurie Wedel and petitioner Robert Tudor (Tudor), an enrolled member of the Chickasaw Tribe.

Shortly after the petition was filed, Tudor moved for custody of Leanne. He alleged that he was her natural father, that he had not consented to the adoption and that he had been prevented from asserting his rights as a parent by Laurie Wedel. A hearing was held on the petition and motion in January 1984. In a post-hearing brief, petitioner challenged Kan.Stat.Ann. §59-2105(c)(4) on Constitutional grounds. On March 23, 1984, the District Court of Butler County, Kansas denied Tudor's motion and

granted respondents' adoption petition.

In doing so, the District Court explicitly refused to find that petitioner was unfit to be a parent. App. at 3a. The sole ground for the District Court's decision was §59-2105 (c)(4). That statute permits illegitimate children to be relinquished without the consent of the natural father where he "failed without reasonable cause to provide support for the mother during the six months prior to the child's birth". Id.

On appeal, petitioner again raised Due Process and Equal Protection challenges to §59-2105(c)(4). See Petitioner's Brief to the Court of Appeals at 7-13. Petitioner also argued that the protective provisions of the Indian Child Welfare Act, 25 U.S.C. §§1901-1963,

were applicable because his daughter was eligible for membership in the Chickasaw Tribe. Id. at 14. The Court of Appeals summarily affirmed the District Court. App. at 12a. Petitioner then requested that the Kansas Supreme Court review the lower court decisions again raising the Constitutional challenges. See Petitioner's Petition for Review to the Kansas Supreme Court. The State Supreme Court denied the petition for review of June 28, 1985. App. at 13a.

## Reasons for Granting the Writ

Under the District Court's decision, as affirmed by the Kansas Court of Appeals and Supreme Court, petitioners' parental rights have been terminated by operation of state law. Although in clear contravention of a federal statute, the Indian Child Welfare Act, as well as the Due Process and Equal Protection clauses of the United States Constitution, that termination will stand unless reviewed and reversed by this Court.

1. The Indian Child Welfare Act, 25 U.S.C. §§1901-1963, was enacted to provide "federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes." 25 U.S.C. §1902. A child is Indian for purposes

of the Act if she is a member of an Indian tribe or she is eligible for membership in an Indian tribe. 25 U.S.C. §1903(4). The Act applies to the biological parents of an Indian child whether wed or unwed. 25 U.S.C. §1903(9). Under the Act, the rights of such parents can only be adversely affected in accordance with the provisions of the Act.

In involuntary proceedings in State court, parental rights cannot be terminated unless it is shown "by evidence beyond a reasonable doubt, including the testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. §1912(f). Further, even in voluntary proceedings, parental consent to termin-

ation of parental rights must be executed in writing before a judge. 25 U.S.C. §1913(a). And, that consent or the consent to adoptive placement of an Indian child can be withdrawn "for any reason at any time" before entry of a final decree of termination or adoption. 25 U.S.C. §1913(c).

The statute relied upon by the District Court, K.S.A. §59-2105(c)(4), is the antithesis of the above provisions. Pursuant to that statute, the District Court granted the adoption of petitioner's daughter and, in effect, terminated his parental rights, see K.S.A. §59-2103(b), without his consent and without a showing that the termination and adoption were necessary to protect the child. Indeed, the District Court specifically refused to find that

petitioner was unfit as a parent. App. at 3a. The action of the District Court was therefore clearly in contravention of the Indian Child Welfare Act.

The protective provisions of the Indian Child Welfare Act must be interpreted as ousting state courts of jurisdiction to act other than in accordance with the Act. Only in that way will the purpose of the Act be furthered. Thus, going as it does to the Kansas court's jurisdiction, petitioner's challenges based on 25 U.S.C. §§1912 and 1913 could not be waived and are properly before this Court. Indeed, Congress has confirmed that interpretation of the Act in §1914.

> Any Indian child who is the subject of any action for . . . termination of parental rights under State law, any parent . . . may petition any court of competent jurisdiction to

> invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.

2. The State's ability to affect petitioner's parental rights is also constrained by the Due Process and Equal Protection clauses of the United States Constitution. Petitioner has an interest in "freedom of personal choice in matters of . . . family life" that is protected by the Due Process Clause of the Fourteenth Amendment. See Quilloin v. Walcott, 434 U.S. 246, 255 (1978). In addition, the Equal Protection Clause prohibits the State of Kansas from treating petitioner differently from other parents except in pursuance of legitimate governmental objectives. See Lehr v. Robertson, 463 U.S. 248, 265 (1983).

Petitioner's daughter was born on

September 26, 1983. The natural mother consented to her adoption on September 27, 1983. Respondents filed an adoption petition on October 18, 1983. One month later, petitioner moved for custody of his daughter asserting that he did not consent to her adoption. Under Kansas law, adoption requires the consent of the mother of an illegitimate child and of the father but as to father only "if required by the court pursuant to K.S.A. 59-2105". Kan.Stat.Ann. §59-2102 (a)(2), (3) (1982). Under §59-2105(c)(4), adoption without the consent of the father is allowed if he failed to provide support for the mother in the six months prior to the child's birth. It was solely on the basis of that statute that the District Court granted respondent's petition over peitioner's objection.

App. at 9a-11a.

a. Petitioner's right to raise his children is "essential". Stanley v. Illinois, 405 U.S. 645, 651 (1972). Kansas may not terminate that right on the basis of a presumption of unfitness such as that in §59-2105(c)(4). Id. at 656-659. That statute "forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities." Id. at 657. The State cannot presume unfitness or, as here, ignore a father's fitness, see App. at 3a, "solely because it is more convenient to presume than to prove", id. at 658, or even "for the sole reason that to do so was thought to be in the [child's] best interest." Smith v. Organization of Foster Families, 431 U.S. 816, 862-863 (1977) (Stewart,

J. concurring in judgment). [1/]

b. In Kansas, the consent of an illegitimate father to the adoption of his children is not required where he did not support the mother in the six months before birth of their child. K.S.A. §59-2105(c)(4). Illegitimate mothers and legitimate parents are not divested of their right to consent under the same circumstances. See K.S.A. §59-2102. Thus, illegitimate fathers are treated differently from illegitimate mothers on the basis of sex and from

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1/ The results in Quilloin, supra, and Lehr, supra, are readily distinguishable because unlike the situations in those cases, petitioner here has demonstrated a full commitment to the responsibilities of parenthood by "coming forward to participate in the rearing of his child" by seeking custody soon after she was born. See Lehr, supra, 463 U.S. at 261; Quilloin, supra, 434 U.S. at 257.

legitimate fathers apparently because of a husband-wife relationship.

The gender-based distinction inherent in the operation of §§59-2102 and 59-2105(c)(4) cannot stand because it does not bear a substantial relationship to any important state interest. The distinction is not required by any "universal difference between maternal and paternal relations at every phase of a child's development," Caban v. Mohammed, 441 U.S. 380, 389 (1979). Nor can it bear a substantial relationship to a State interest in "promoting the adoption of illegitimate children." Id. at 393. Likewise, the distinction between illegitimate and legitimate fathers violates the Equal Protection Clause where, as here, the illegitimate father expresses from the outset a sincere and

determined interest in rearing his child. 2/ Stanley, supra, 405 U.S. at 658. The effect of the Kansas classification is clearly a constitutionally invalid discrimination against unwed fathers. Caban, supra, 441 U.S. at 394.

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2/ For the same reason, the decisions in Quilloin, supra, and Lehr, supra, are distinguishable. See note 1 above.

## Conclusion

The petition for writ of certiorari should be granted. 3/

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September 1985

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3/ If granted, petitioner would request that this Court reverse the State court decisions and remand for proceedings in accordance with the Indian Child Welfare Act. Petitioner respectfully suggests that that could have the result of curing the Constitutional problems raised by the Kansas statutes. As shown above, there can be no automatic termination of parental rights under the Indian Child Welfare Act. And, under that Act all parents are treated the same .

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APPENDIX A--Decision of the District Court of Butler County, Kansas Dated March 23, 1984

83-A-57

IN THE DISTRICT COURT OF
BUTLER COUNTY, KANSAS

In the Matter of the Adoption of

Leanne Marie Wedel, a Minor Child

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MEMORANDUM OPINION

Statement of Case

This is a petition to adopt Leanne Marie Wedel, an illegitimate child born September 26, 1983, brought by Jeffrey Lee Glaesman and his wife, Esther Marie. The petition was filed on October 18, 1983, along with a consent to adopt signed by the natural mother, Laurie Denise Wedel, dated September 27, 1983. On November 22, 1983, Robert Tudor filed

a motion for custody alleging that he was the natural father of the child, that he had not consented to the adoption and that he had been prevented from exercising his parental rights by the actions of the natural mother. The Court has emphasized the dates because they show how this unfortunate case has developed.

The cause was tried to the Court on January 4, 1984, Robert Tudor acknowledges, belatedly, that he is the natural father of the child. By his own testimony he did not acknowledge in his own mind that he was the father of the child until approximately three weeks after her birth and then only after he had been able to count the days from the date of birth to the approximate date of conception and satisfy himself that Laurie was living with him at the time.

At all other times he has publicly denied that he was the father of the child. His mother testified that he privately acknowledged to her that he was the father of Laurie's baby in July, 1983. Mr. Tudor also admits that he has not provided support for six months proceeding the birth, although he alleges that it was with just cause.

Petitioners also allege that he is unfit to be a parent and that he abandoned the mother after having knowledge of her pregnancy. No evidence has been presented to support these contentions and the Court has disregarded them.

Issue

The sole issue before the Court is whether Robert Tudor failed without reasonable cause to provide support for the mother during the six months prior

to the child's birth.

Findings of Fact

Laurie Wedel first met Robert Tudor when they were both students at Baptist Bible College in Springfield, Missouri, which she attended for one semester in the fall of 1981. At the end of that semester she left Baptist Bible College but she stayed on in Springfield, seeing Robert until March, 1982, when she returned to her home town of Garden City, Kansas. In April or May of 1982, Robert persuaded Laurie to come to Houston, Texas, and live with him and his mother. Laurie did so and remained in Houston until the fall of 1982, when Robert returned to Baptist Bible College and she moved back to Garden City. In October of 1982, Laurie and a girlfriend attended a football game at Baptist

Bible College and met Robert there. Afterwards, Robert followed them back to Garden City and once again persuaded Laurie to come back to Houston and live with his mother. Laurie returned to Houston and, except for a visit to Garden City during the Christmas and New Year's holidays, remained there until approximately the first week of March, 1983.

In February, 1983, Laurie became worried because she had missed her period for the second month in a row and talked to Robert about it. Robert thought she might be pregnant and suggested a pregnancy test at the Woman's Outpatient Clinic. The test was performed and the results were positive for pregnancy. The situation was difficult for Robert because he didn't want to accept the

fact of Laurie's pregnancy or acknowledge any responsibility for it. Although the parties disagree over who brought it up, one of the first things discussed was abortion. Also discussed was a suggestion by Robert that Laurie go home to have the child, put it up for adoption and then come back and live with him. Another idea was that she go to an unwed mothers home.

It is apparent to the Court from the testimony of both Robert and Laurie that while Robert wanted Laurie to remain with him, he didn't want to accept the child. Apparently the situation led to steady deterioration in the relationship with increasingly bitter arguments and fights. During one such argument, Robert was taking Laurie and her bags to the bus station. He became so upset he

dropped her in the middle of downtown Houston. Later he returned, picked her up and took her home again. Laurie refused to stay with him, but stayed with a girlfriend that night. She also called her brothers to come and get her. The next day, Robert tried to apologize but the situation could not be resolved and Laurie left for home.

In July, 1982, Laurie went to a pay phone in Garden City and called Robert, he then called her back. At trial Laurie testified that she didn't want to call from anyone's house because she hadn't told her parents about the baby before July and didn't want anyone to know what she was doing, not because she wanted Robert to pay for the call. She also stated that the reason she called was because she was desperate and needed

support. She had not been to see a doctor yet and had no money to pay for doctor fees or medical care. Robert denied paternity saying that he didn't know whether it was his or not. He did offer to see that she receive medical care, is she came to Houston. Laurie claims he didn't offer any money himself but to put her in a hospital where they would pay all the expenses provided the baby was released to them. He also stated she could live with his relatives and he would come to see her. Laurie refused these offers.

On July 26, Robert's birthday, Laurie called him again and the conversation was much the same. Robert said he didn't know if the baby was his or not, it might belong to his best friend. He also offered medical care only if

Laurie came to Houston and refused to say whether he would consent to an adoption. Laurie refused to go to Houston.

On August 31, .aurie Wedel saw a doctor for the first time. On September 26, her baby was born. The next day she signed a consent to adopt. It was not until November 14, 1983, when Robert Tudor appeared at the Glaesman home, asking to see his daughter did anyone know that he was now acknowledging paternity.

Conclusion of Law

1. Robert Tudor apparently believes that Laurie Wedel's act of leaving Houston against his wishes and her failure to return to him so that he could provide medical assistance under his own terms and conditions is suffi-

cient cause to relieve him of the responsibility of providing support to her during the last six months of her pregnancy.

The Court is not impressed with this argument. It is clear to the Court that one of the principle reasons for Laurie Wedel's departure from Houston and refusal to return was Robert Tudor's steadfast refusal to acknowledge paternity. It is also clear that he didn't offer any money himself but only to put her in the hands of third parties who would see to her needs. Laurie Wedel may well have been justified if she had suspected that Robert's offers of medical assistance were simply a lure to bring her back to him without his having to accept any responsibility for the child and his failure to send any assistance to Garden

City, simply a means of increasing the pressure.

Whatever the reasons, the Court finds that Robert Tudor has failed, without reasonable cause, to provide support to Laurie Wedel, the natural mother of the child, within six months prior to the birth of said child and his consent to the adoption of such child is not required.

2. That Laurie Denise Wedel has consented to the adoption of Leanne Marie Wedel and filed her written consent herein.

3. That both Robert Tudor and Laurie Denise Wedel have acknowledged that they are the natural parents of Leanne Marie Wedel.

4. That petitioners are fit and

proper persons to adopt Leanne Marie Wedel.

IT IS THEREFORE BY THE COURT ORDERED that Jeffrey Lee Glaesman and Esther Marie Glaesman be permitted to adopt Leanne Marie Wedel and that her name shall be changed to Leanne Marie Glaesman. The Court Further Orders that no further journal entry is required and that this opinion shall be effective as a journal entry upon filing.

JOHN M. JAWORSKY
Associate District Judge

Filed: March 23, 1984

## APPENDIX B--Decision of the Court of Appeals of the State of Kansas, Dated April 4, 1985

NOT DESIGNATED FOR PUBLICATION

No. 56,888

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE ADOPTION OF L.M.W.

MEMORANDUM OPINION

Appeal from Butler District Court; JOHN M. JAWORSKY, judge. Opinion filed April 4, 1985. Affirmed.

Pamela S. Fahey, of Horton, for the appellant.

F. Greg Mathias, of El Dorado, for the appellee.

Before FOTH, C.J., SWINEHART, J., and FREDERICK WOLESLAGEL, District Judge Retired, Assigned.

PER CURIAM: Affirmed under Rule 7.042 (b) and (d) (232 Kan. cxvii).

APPENDIX C--Decision of the Supreme Court of the State of Kansas, Dated June 28, 1985

84-56888-A

IN THE SUPREME COURT OF THE STATE OF KANSAS

In the Matter of the Adoption of LEANNE MARIE WEDEL, a Minor Child.

v.

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You are hereby notified of the following action taken in the above entitled case:

PETITION FOR REVIEW.

DENIED.

Yours very truly,

LEWIS C. CARTER
Clerk, Supreme Court

Date June 28, 1985

Supreme Court, U.S.
FILED
OCT 30 1985
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-524

# In the Supreme Court of the United States

**October Term, 1985**

ROBERT TUDOR,
*Petitioner,*

vs.

JEFFERY LEE GLAESMAN and
ESTHER MARIE GLAESMAN,
*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

## BRIEF IN OPPOSITION

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9 pp

## QUESTION PRESENTED

Since petitioner failed to raise any federal questions in the state trial court, and the state courts accordingly did not rule on any federal questions, must the petition for writ of certiorari be dismissed or denied for lack of jurisdiction in this Court under 28 U.S.C. Sec. 1257(3)?

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# No. 85-524

# In the Supreme Court of the United States

**October Term, 1985**

ROBERT TUDOR,
*Petitioner,*

vs.

JEFFERY LEE GLAESMAN and
ESTHER MARIE GLAESMAN,
*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

## BRIEF IN OPPOSITION

### A. The Petition Must Be Dismissed or Denied for Lack of Jurisdiction in This Court.

Petitioner at no time raised any federal question, constitutional or otherwise, in the state trial court proceedings. There was no evidence or contention presented that petitioner was an Indian or that his illegitimate child adopted by respondents was an Indian child; and there was no mention or intimation that any federal statute relating to Indians was relied upon or pertinent to the adoption proceeding in the state court.

Petitioner's statement (Petition, p. 6) that he challenged the state adoption statute on constitutional grounds in a post-hearing brief, is in error. There was no claim or intimation by petitioner in any of his filings or in the evidentiary proceedings in the state trial court raising

any constitutional objections whatever. (Petitioner's Motion for Order of Custody, filed November 22, 1983; Transcript of Proceedings January 4, 5, 1984, Vols. 1 and 2, including opening statements, evidence, and closing arguments; Robert Tudor's Suggested Findings of Fact and Conclusions of Law, filed January 16, 1984; Memorandum Brief of Respondent Robert Tudor, filed January 16, 1984). There was no evidence, statement or suggestion that Robert Tudor was of Indian blood; or that the child was of Indian blood. The federal Indian Child Welfare Act was not mentioned or relied upon.

Accordingly, the trial court's opinion and order granting the adoption did not mention or purport to rule on any federal issues. (Appendix to Petition, pp. 1a-12a). For the same reasons, the Kansas Court of Appeals' summary affirmance passed on no federal issues, constitutional or otherwise. (Appendix to Petition, p. 13a). The Supreme Court of Kansas denied review (Appendix to Petition, p. 14a), and thus necessarily declined to rule on any federal issues.

Under 28 U.S.C. Sec. 1257(3), this Court is granted power to review by writ of certiorari final judgments of the highest court of a state in which a decision could be had, where the validity of a federal or state statute is "drawn in question" on federal constitutional grounds, or where "any title, right, privilege or immunity" is specially set up or claimed under the federal constitution or federal statutes, treaties or commissions. If the claimed federal rights were not asserted in the state trial court, and were not passed upon by state appellate courts (even if raised by the party during appellate stages), this Court has no power to review the federal claims. *Bailey v. Anderson,* 326 U.S. 203 (1945); *Street v. New York,* 394 U.S. 576, 582 (1969).

Rule 21(h) of this Court requires these jurisdictional prerequisites to be stated in the Petition with specific reference to the record so as to "show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari."

Petitioner made reference in his state appellate brief, and in his petition to the state supreme court, to federal constitutional questions; and made reference in the appellate brief, but not in his petition to the state supreme court, to the Indian Child Welfare Act. These appellate afterthoughts, however, were insufficient to timely and properly raise the federal questions which petitioner now asserts, where the state appellate courts did not pass on them. *Bailey v. Anderson,* 326 U.S. 203 (1945).

The Petition must be dismissed or denied for lack of jurisdiction.

**B. Petitioner's Claim That He Was Denied Due Process and Equal Protection Is Groundless.**

Leanne Marie Wedel, an illegitimate child, was born to Laurie Wedel on September 26, 1983. The mother consented to an adoption by respondents on the next day. Respondents filed their petition seeking the adoption on October 18, 1983. Not until November 24, 1983, did petitioner Robert Tudor even acknowledge his paternity. He failed and refused, without reasonable cause, to provide needed support for the child's mother during the pregnancy.

The Kansas adoption statutes were amended in 1982 to protect the rights of biological fathers of illegitimate children, as enunciated by this Court in *Caban v. Mohammed,* 441 U.S. 380 (1979). K.S.A. 59-2105 requires the

consent of the illegitimate father to an adoption unless the trial court finds the existence of one or more factors listed, such as that "(4) the father failed without reasonable cause to provide support for the mother during the six months prior to the child's birth."

In *Caban, supra,* the New York statute permitted the mother to block the adoption of her child simply by withholding consent. The father of the illegitimate child had no similar control, "even when his parental relationship is substantial" consisting of helping raise the children in a family setting for several years.

The Kansas statute, however, dispenses with consent from the father of an illegitimate child only when one or more significant factors defining the relationship, rationally justifying such action, are present. The validity of this treatment and classification under the due process and equal protection clauses is confirmed by *Lehr v. Robertson,* 463 U.S. 248 (1983), where the state statute required consent by the father of the illegitimate child only if the father had legitimated the child.

Petitioner was found to have failed, without reasonable cause, to support the mother during the six month period prior to birth—a time of great need for an expectant mother. In these circumstances, where the mother is forced to support herself during a time of hardship to bring an infant into the world, it is obviously a rational classification requiring that mother's consent to adoption, but dispensing with the consent of the father who has not cared enough about the child to provide support.

Petitioner herein was also afforded due process by being notified of the adoption proceeding and being permitted to present evidence and arguments. He sought only to avoid the factual findings enumerated in the Kan-

sas statute, being represented by counsel at that stage and every other stage in the state court system. Constitutional issues were not presented because they would have been insubstantial, just as they are at this late stage in the case.

**C. The Indian Child Welfare Act Is Inapplicable.**

The state courts did not pass on the alleged applicability of the Indian Child Welfare Act, 29 U.S.C. Secs. 1901, *et seq.*, because there was never any evidence or contention that either petitioner as the father, or the adoptive infant, were Indians.

Since the state court did not know and had no reason to know that an Indian child was involved (if indeed the child was Indian), there was no duty or occasion to give notice required by 29 U.S.C. Sec. 1912(a), pertaining to involuntary proceedings.

Moreover, Laurie Wedel, the natural mother of the infant, not only consented to the adoption by respondents, but affirmatively testified at the hearing in favor of such adoption. It was her testimony that if the adoption by respondents were refused, she would withdraw her consent and take custody of the child herself to prevent petitioner from taking the child:

> "Q. Now, Laurie, in the event that the Court would not grant the adoption, what are your wishes concerning the child?
>
> A. I would withdraw the consent and get her—try to get her myself.
>
> Q. And why—why do you feel that way?
>
> A. Because I feel I have a right home to go into with my parents who love her and not one that could

abuse her the way he abused me." (Tr. of Hearing, Case No. 83 A 57, District Court of Butler County, Kansas, Vol. 1, January 4, 1984).

Even had petitioner proved that the infant was an Indian child the federal Act would not require denial of the adoption since the natural mother is not claimed to be an Indian, and because she would withdraw consent and keep her child as against the claims of the natural father. 29 U.S.C. Sec. 1913(c).

## CONCLUSION

The Petition should be dismissed or denied for lack of jurisdiction.

The Petition should also be denied because the federal claims are insubstantial and without any support in the record.

Respectfully submitted,

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No. 85-524

In The
# Supreme Court of the United States
October Term, 1985

ROBERT TUDOR,

*Petitioner,*

v.

JEFFREY LEE GLAESMAN and
ESTHER MARIE GLAESMAN,

*Respondents.*

**On Petition for Writ of Certiorari to the Supreme Court of the State of Kansas**

## PETITIONER'S REPLY BRIEF

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## INTRODUCTION

Petitioner, an enrolled member of the Chickasaw Tribe, moved for custody of his daughter shortly after she was born. Petitioner's motion was denied by a Kansas district court which went on to terminate his parental rights and allow the adoption of his daughter by respondents. The sole basis for the district court's action was a Kansas statute that dispenses with the necessity for an illegitimate father's consent to the adoption of his child if he failed to provide support for the mother in the six months before the child's birth. K.S.A. 59-2105(c)(4).

Petitioner raised federal questions regarding the constitutionality of the statute and asserted the applicability of the Indian Child Welfare Act in the Kansas Court of Appeals.[1] The Kansas Court of Appeals summarily affirmed the trial court's decision. Appendix to the Petition for Writ of Certiorari at 13a. Petitioner's constitutional claims (but not the Indian Child Welfare Act claim) were reiterated to the Kansas Supreme Court but that Court declined to review the case. *Id.* at 14a.

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## ARGUMENT

Despite the fact that petitioner's federal claims were clearly raised in the Kansas appellate courts, respondents argue that this Court cannot now consider them because they were not properly raised. Respondents also argue

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[1]It is arguable that the constitutional claims were made in the Kansas trial court. Petitioner, who has been represented by different counsel at each stage of the proceedings in this case, thought that a discussion of this Court's decision in Caban v. Mohammed, 441 U.S. 380 (1979) and a reference to equal protection in his post-trial memorandum meant that the constitutional claims had been made. In any event, as shown in this brief the fact that those claims may not have been made in the trial court does not preclude review by this Court.

that the federal claims are without merit. For the reasons set out below, petitioner's federal claims are properly before this Court and require that the action taken below be reversed.

## I. THIS COURT HAS JURISDICTION TO REVIEW THE LOWER COURT DECISIONS

Petitioner has invoked this Court's jurisdiction under 28 U.S.C. § 1257(3). As required by that statute, petitioner has drawn in question the constitutional validity of a state statute and has specially set up federal rights. A determination by the Kansas Courts of petitioner's federal claims was necessary because they bore directly on the legitimacy of the adoption that was granted and affirmed by those courts. Despite the necessity of determining the federal claims, the state Court of Appeals did not explicitly address them and the Kansas Supreme Court refused to review that decision. Whatever the reason for the neglect of the state courts, however, their failure cannot serve to deprive this Court of jurisdiction.

### A. Kansas Appellate Courts Review Claims That Were Not Raised in the Trial Court

Although a Kansas court of review will generally consider only those issues asserted in the trial court, there are exceptions to that rule that appear to be regularly utilized and that are directly applicable here.

The relevant exceptions have been stated and applied many times by the Kansas courts. In *Vansickle v. Shanahan*, 212 Kan. 426, 511 P.2d 223 (1973), the Kansas Supreme Court was faced with a constitutional argument that had neither been raised in nor considered by the district court. The Supreme Court held that that omission was not fatal to its consideration of the contention.

> The constitutionality of a statute should be considered in any action where it is necessary in order to determine the merits of the action or where the issues cannot be intelligently decided without doing so, notwithstanding the failure of the parties to raise the constitutional question, failure to plead the question, or failure to present the question to the trial court.

*Id.* 212 Kan. at 434, 511 P.2d at 231. *citing State v. Nelson,* 210 Kan. 439, 502 P.2d 841 (1972).

Other types of claims are also reviewable even though not raised in the trial court. Kansas appellate courts will consider newly-asserted issues when they arise from proven or admitted facts and will be finally determinative of the case or when consideration of them is necessary to serve the ends of justice or to prevent the denial of fundamental rights. *State v. Puckett,* 230 Kan. 596, 598-599, 640 P.2d 1198, 1200 (1982)[2]; *Pierce v. Board of County Commissioners,* 200 Kan. 74, 434 P.2d 858 ((1967).[3]

Petitioner's constitutional and Indian Child Welfare Act claims clearly fit within the above exceptions. They involve only issues of law, there are no factual disputes and they assert a denial of fundamental rights. The Kansas Supreme Court has, in fact, addressed previously unasserted claims in a case very much like this one.

In the *Matter of the Adoption of Baby Boy L,* 231 Kan. 199, 643 P.2d 168 (1982), the appellees moved for the adoption of Baby Boy L, the illegitimate son of a non-Indian woman and an enrolled member of the Kiowa Tribe. The trial

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[2]Indeed, Kansas courts can themselves raise and decide issues that were never asserted by the parties. *Id.* 230 Kan. at 599, 640 P.2d at 1200.

[3]*See also* Fields v. Stauffer Publications, Inc., 2 Kan. App. 2d 323, 578 P.2d 1138, *review denied* 225 Kan. 843 (1978); *cf.* Taco Bell v. City of Mission, 234 Kan. 879, 678 P.2d 133 (1984); Wortman v. Sun Oil Co., 236 Kan. 266, 690 P.2d 385 (1984).

court found the father unfit to assume parental duties and granted the adoption. In the state Supreme Court, the father argued, for the first time, that the Kansas statute which permitted the adoption of an illegitimate child with only the consent of the mother, K.S.A. 59-2102(2)[4], was unconstitutional. The court had no problem with addressing the argument. "While this argument was not presented to the trial court and ordinarily would not be considered on appeal, we deem the issue raised under *Caban* [*v. Mohammed*] of such significance that we will address the issue". *Baby Boy L,* 231 Kan. at 21[illegible] 643 P.2d at 180.

Given the willingness of the Kansas appellate courts to consider newly-raised issues in cases like this one, there is no jurisdictional obstacle to this Court's review of petitioner's claims.

> [W]here a State allows questions of this sort [federal questions] to be raised at a late stage and be determined by its courts as a matter of discretion, we are not concluded from assuming jurisdiction. . . A state court may not, in the exercise of its discretion, decline to entertain a constitutional claim while passing upon kindred issues raised in the same manner.

*Williams v. Georgia,* 349 U.S. 375, 383 (1954); *Barr v. Columbia,* 378 U.S. 146, 149 (1964) ("State procedural requirements which are not strictly or regularly followed cannot deprive us of the right to review."); *James v. Kentucky,* — U.S. —, —, 104 S.Ct. 1830, 1835 (1984).

The fact that the Kansas Court of Appeals[5] did not explicitly address petitioner's federal claims does not mat-

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[4]The version of K.S.A. 59-2102(2) at issue in *Baby Boy L* was amended in 1982. Kan.L.1982, ch. 182, § 136.

[5]Review by the Kansas Supreme Court was discretionary. *See* K.S.A. 20-3018(b). Because that Court declined review, it is the Court of Appeals' decision that is before this Court. *Cf.* Michigan-Wisconsin Pipeline Co. v. Calvert, 347 U.S. 157, 160 (1952) (discussing 28 U.S.C. § 1257(2)).

ter. Those claims were a direct challenge to the action of the District Court. The Court of Appeals' summary affirmance therefore "must have rested either upon a substantive rejection of the federal claims or upon a procedural rule that the state court applies only irregularly". *Hathorn v. Lovorn*, 457 U.S. 255, 264-265 (1982). And, again there is no independent and adequate state ground barring this Court's review of the federal claims. *Id.*[6]

### B. Petitioner's Federal Claims Challenge the Subject-Matter Jurisdiction of the Kansas Courts

In Kansas, consent by the natural parents to the adoption of their child is "an essential requisite to jurisdiction on the part of the court to render a valid decree of adoption." *In re Marsolf*, 200 Kan. 128, 131, 434 P.2d 1010, 1014 (1967). In the instant case, the district court granted the adoption of petitioner's child without his consent on the basis of an exception to the consent requirement. K.S.A. 59-2105(c)(4). If, as petitioner argues, the exception is invalid, petitioner's consent was required and without it the Kansas court did not have subject-matter jurisdiction to enter an adoption decree. *Marsolf*, 200 Kan. at 131, 434 P.2d at 1014. Further, the Kansas courts had "a continuing duty of determining even on [their] own initiative" whether they had subject-matter jurisdiction. *Id.*, 200 Kan. at 132, 434 P.2d at 1014. Petitioner's claims therefore could not have been waived by any failure to raise them in the trial court. *Id.; see also Flast v. Cohen,*

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[6]Because it is the Court of Appeals' decision that is before this Court, *see* n. 5 above, the fact that petitioner's Indian Child Welfare Act claim was not asserted in the Kansas Supreme Court does not bar this Court's review of that claim. In addition, had the Kansas Supreme Court granted review, the case would have been "heard on the . . . briefs previously filed in the Court of Appeals", K.S.A. 60-2701a, Kansas Rule of Appellate Practice 8.03(b), which contained the Indian Child Welfare Act claim. *See also* the discussion below at 5-6.

392 U.S. 83, 88 n.2 (1968); *United States v. Griffin,* 303 U.S. 226, 229 (1938). And, this Court has jurisdiction to review them.[7]

## II. THIS COURT SHOULD REVIEW THE LOWER COURT DECISIONS

If allowed to stand, the actions of the Kansas courts would result in the termination of petitioner's parental rights and the denial, from the very outset, of any opportunity for petitioner to develop a relationship with his daughter. That outcome is intolerable and should be reviewed by this Court because it can only occur through the violation of a federal statute and the United States Constitution. Petitioner's claims raise important issues regarding the application and interpretation of the Indian Child Welfare Act and the constitutionality of K.S.A. 59-2105(c)(4).

### A. The Standard Embodied in K.S.A. 59-2105(c)(4) and Relied Upon by the Kansas Courts Violates Due Process

Respondents argue that petitioner was accorded due process because he was notified of and allowed to participate in the adoption proceeding. That does not, however, address petitioner's due process claim. Petitioner challenges the standard used in the termination of his parental rights and adoption of his daughter.

The Kansas statute at issue, 59-2105(c)(4), allows adoption without the consent of an illegitimate father

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[7]This Court has jurisdiction to consider petitioner's Indian Child Welfare Act claims for a separate reason as well. Congress has specifically provided that the termination of parental rights in violation of the Act may be invalidated by any court of competent jurisdiction. 25 U.S.C. § 1914. Petitioner's claims under that Act therefore could not be waived. The Kansas courts had a continuing duty to determine the applicability of the Act and to implement its protective provisions. Cf. Pino v. Natural Mother, 700 P.2d 198 (N.M. Ct. App. 1985).

where he did not support the mother in the six months before the birth of their child. The effect of the statute is to permit adoption and termination of parental rights against the wishes of illegitimate fathers before they have even had the opportunity to form a relationship with their children. That is directly in conflict with the decisions of this Court recognizing that it is precisely that opportunity that the Due Process Clause protects in this situation. *Lehr v. Robertson,* 463 U.S. 248, 262 (1983); *Quilloin v. Walcott,* 434 U.S. 246, 254-255 (1978). Thus, the statutory standard can, as in this case, arbitrarily eliminate that opportunity even though the natural father has demonstrated his commitment by seeking custody directly after his child was born.

### B. There is no Rational Basis for the Unequal Treatment Afforded Unwed Fathers in the Kansas Statute

The Kansas statute dispenses with the necessity of obtaining an unwed father's consent in certain situations. Kansas does not eliminate the right to consent of unwed mothers and legitimate parents in the same situations. Respondents argue that there is a rational basis for that disparate treatment because where the statute applies the mother has supported herself without assistance from the father.

In the first place, that argument provides no justification for the differing treatment of legitimate and illegitimate fathers. A legitimate father could fail to provide support in the last six months of his wife's pregnancy and yet retain the right to consent to his child's adoption. Secondly, as in the due process context, this Court has recog-

nized that "the existence or nonexistence of a substantial *relationship between parent and child* is a relevant criterion in evaluating both the rights of the parent and the best interests of the child." *Lehr,* 463 U.S. at 266-267 (emphasis added). K.S.A. 59-2105(c) (4), however, operates to divest illegitimate fathers of the right to consent because of actions that take place before the birth of the child. There is no opportunity for the unwed father to establish that he and the unwed mother are in fact "similarly situated *with regard to their relationship with the child*". *Lehr,* 463 U.S. at 267 (emphasis added). The result is especially harsh where, as here, the father has come forward at the outset and sought custody.

### C. Application of the Kansas Statute to an Indian Parent Violates the Indian Child Welfare Act

It is clear and indisputable that the use of K.S.A. 59-2105(c) (4) to terminate the parental rights of petitioner, an enrolled member of an Indian tribe, violated the Indian Child Welfare Act (hereafter "Act"). Under the Act, those rights may be terminated in involuntary state proceedings only upon a determination "supported by evidence beyond a reasonable doubt, including the testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. §1912(f).

Respondents do not contest the fact that there was a violation but argue that the state courts did not determine the applicability of the Act because there was no evidence

or contention that petitioner or his daughter were Indians.[8] In the Kansas Court of Appeals, however, petitioner informed the court that he had discovered that his daughter was eligible for membership in the Chickasaw Tribe. Petitioner's Brief to the Court of Appeals at 14. He requested that the court vacate the district court's adoption decree and remand for proceedings in light of the Act. *Id.* Respondents did not (and do not now) contest that petitioner or his child are Indian. Faced with the contention that the Act applied and the invocation of 25 U.S.C. §1914, the Court of Appeals had the authority and duty to invalidate the adoption decree and remand for proceedings in light of the Act or, at the very least, proceedings to determine the applicability of the Act.

Respondents also argue that if the Act were applied it would not require a different result because, in that instance, the mother would withdraw her consent to the adoption. That argument is a completely unwarranted minimization of the impact of the Act on these proceedings. First, and foremost, application of the Act would prevent the termination of petitioner's parental rights in the facile manner allowed by the Kansas statute. That in itself is sufficient reason to apply the Act. Application would, however, also guarantee that any future proceedings would be conducted in accordance with the Act and would thereby implement

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[8]In adoption proceedings, Kansas law authorizes social workers reporting on the advisability of adoptions to obtain genetic information about the children involved. K.S.A. 59-2278(c). Had that been done in this case, the trial court would have been aware of petitioner's and his daughter's Indian heritage.

the protective provisions that have been mandated by Congress.

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